MENTERI KESEJAHTERAAN BANDAR, PERUMAHAN DAN KERAJAAN TEMPATAN & ANOR v. ANG MING LEE & ORS AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
HASNAH MOHAMMED HASHIM JCA
HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEALS NO: W-01(A)-80-03-2017, W-01(A)-81-03-2017, W-01(A)-86-03-2017, W-01(A)-400-03-2017 & W-01(A)-451-03-2017]
22 MAY 2018

ADMINISTRATIVE LAW: *Judicial review – Exercise of discretion – Application by developer for extension of time for delivery of vacant possession – Minister granted extension – Whether decision beyond jurisdiction – Whether reg. 11(3) of Housing Development (Control and Licensing) Regulations 1989 ultra vires Housing Development (Control and Licensing) Act 1966 – Whether purchasers given right to be heard prior to decision – Whether decision affected rights of purchasers to claim damages in event of delay – Whether decision valid*

CONTRACT: *Housing development – Sale and purchase agreement – Agreement provided for delivery of vacant possession in 36 months – Application by developer for extension of time for delivery of vacant possession – Minister granted extension – Whether decision beyond jurisdiction – Whether reg. 11(3) of Housing Development (Control and Licensing) Regulations 1989 ultra vires Housing Development (Control and Licensing) Act 1966 – Whether purchasers given right to be heard prior to decision – Whether decision affected rights of purchasers to claim damages in event of delay – Whether decision valid*

BHL Construction Sdn Bhd, one of the appellants in this appeal ('the developer'), was the developer of a project to build a condominium whilst the respondents were purchasers of individual condominium units in the said project. The sale and purchase agreement ('SPA') between the developer and the purchasers stipulated that the time period for delivery of vacant possession of the units shall be 36 months from the date of signing of the respective SPAs. *Vide* a letter dated 20 October 2014, the developer filed an application for an extension of time for the delivery of vacant possession to the Controller of Housing ('the Controller') pursuant to reg. 11 of the Housing Development (Control and Licensing) Regulations 1989 ('the Regulations 1989'). However, the application was not approved. Subsequently, exercising the right afforded under reg. 12 of the Regulations 1989, the developer lodged an appeal to the Minister for Urban Wellbeing, Housing and Local Government ('the Minister') *vide* a letter dated 28 October 2014. The Minister, *vide* a letter dated 17 November 2015, granted an extension of 12 months. Aggrieved with the decision, the purchasers filed applications for judicial review seeking to quash the decision. Alternatively, they sought a declaration that the letter of

17 November 2015 was invalid as being beyond the jurisdiction stipulated in the Housing Development (Control and Licensing) Act 1966 ('the Act') and that reg. 11(3) of the Regulations 1989 is *ultra vires* the Act. The High Court granted the judicial review application on the main basis that reg. 11(3) was *ultra vires* the Act and that the Controller had no power to waive or modify the contract of sale between the purchasers and the developer. Hence, the appeals. The issues raised for the court's consideration were: (i) whether reg. 11(3) of the Regulations 1989 *ultra vires* the Act; (ii) whether the letter of 17 November 2015 was made without jurisdiction and was therefore invalid and of no effect; and (iii) whether the purchasers ought to have been given a right of hearing prior to the decision made by the Controller and/or Minister.

Held (allowing appeal with no order as to costs)
Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) Regulation 11(3) is not *ultra vires* the Act as it is a provision designed to regulate and control the terms of the SPA as envisaged by s. 24(2)(e) of the Act. The argument that only the Minister has the power to modify or waive the statutory form contract was without merit as s. 4 of the Act provides that the Controller may exercise any of the powers by or under this Act. It must follow that the Controller has the power to exercise his discretion as granted under reg. 11(3). (para 17)

(2) The Controller has wide powers under the Act. There was therefore no justification that the power to modify or waive the contract must be exercised only by the Minister and could not be delegated to the Controller. It was also significant that the SPAs between the developer and the purchasers and the terms contained therein were derived from the form prescribed in Schedule H which is to be found in the Regulations 1989 and not in the Act. It can therefore be reasonably inferred that the power granted to the Minister was intended to be delegable. Hence, the judge was plainly wrong in holding that reg. 11(3) was *ultra vires* the Act. (paras 18 & 19)

(3) The letter of 17 November 2015 was signed by one Jayaseelan a/l K Navaratnam, on behalf of the Controller. There was no indication from the face of the letter that the decision was conveyed on behalf of the Minister or that the signatory of the letter was acting on the authority of the Minister. In fact, the letter stated that it was the 'Kementerian' (Ministry) which had taken the decision, which was indicated to have been made pursuant to reg. 11 instead of reg. 12. Since the Minister did not file any affidavit to provide some clarity, the contention that the Minister was not the one who made the decision was with merit and could not be dismissed lightly. Therefore, the order as contained in the letter of 17 November 2015, was made without jurisdiction and *ultra vires* the Act. Accordingly, the order in the said letter was a nullity and of no effect. (paras 21-23)

(4) The rights of the purchasers to claim damages in the event of delay would be adversely affected or even extinguished. As the purchasers comprised a group which could easily be ascertained, they should, at least, be notified of the developer's application for any extension of time to complete the project and be given a reasonable period of time to state their views before any such decision was taken. As no such right to be heard was afforded to the purchasers, the decision made, whether by the Controller or Minister, was null and void and of no effect and should accordingly be set aside. (paras 24 & 25)

(5) No Government or public authority can have absolute or unfettered discretion in carrying out its functions. Therefore, the courts must have the power to strike down administrative decisions which are not according to law or made in excess of the power provided by law. The Minister, who was entrusted with the discretionary power under the 1989 Regulations, must act fairly. It does not matter whether the discretionary power to be exercised was judicial in nature, or *quasi*-judicial or even a purely administrative one. In this instant case, the decision of the Minister could not stand and must be set aside since the purchasers were not given the opportunity to be heard. In the circumstances, the order declaring reg. 11(3) *ultra vires* the Act was set aside and the order that the decision in the letter of 17 November 2015 was null and void was affirmed. (paras 30-32)

Bahasa Malaysia *Headnotes*

BHL Construction Sdn Bhd, salah satu perayu dalam rayuan ini ('pemaju'), adalah pemaju projek pembinaan kondominium manakala responden-responden adalah pembeli unit kondominium individu dalam projek tersebut. Perjanjian jual beli ('PJB') antara pemaju dan pembeli-pembeli memperuntukkan bahawa tempoh masa untuk penyerahan milikan kosong unit-unit tersebut ialah 36 bulan dari tarikh PJB ditandatangani. Melalui surat bertarikh 20 Oktober 2014, pemaju memfailkan permohonan lanjutan masa penyerahan milikan kosong kepada Pengawal Perumahan ('Pengawal'), menurut peraturan 11 Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989 ('Peraturan-Peraturan 1989'). Walau bagaimanapun, permohonan tersebut tidak diluluskan. Kemudian, dalam menjalankan kuasa yang diberi bawah peraturan 12 Peraturan-peraturan 1989, pemaju merayu kepada Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan ('Menteri') melalui surat bertarikh 28 Oktober 2014. Menteri, melalui surat bertarikh 17 November 2015, membenarkan lanjutan selama 12 bulan. Terkilan dengan keputusan tersebut, pembeli-pembeli memfailkan permohonan-permohonan untuk semakan kehakiman memohon pembatalan keputusan tersebut. Secara alternatifnya, mereka memohon deklarasi bahawa surat bertarikh 17 November 2015 tidak sah kerana melampaui bidang kuasa yang dinyatakan dalam Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ('Akta') dan bahawa peraturan 11(3) Peraturan-Peraturan 1989 *ultra*

A *vires* Akta. Mahkamah Tinggi membenarkan permohonan semakan kehakiman atas asas utama bahawa peraturan 11(3) adalah *ultra vires* Akta dan bahawa Pengawal tiada kuasa mengecualikan atau mengubah kontrak jualan antara pembeli-pembeli dan pemaju. Oleh itu, rayuan-rayuan ini. Isu-isu yang dibangkitkan untuk pertimbangan mahkamah ialah: (i) sama ada
B peraturan 11(3) Peraturan-Peraturan 1989 *ultra vires* Akta; (ii) sama ada surat bertarikh 17 November 2015 dibuat tanpa bidang kuasa dan oleh itu tidak sah dan tiada kesan; dan (iii) sama ada pembeli-pembeli perlu diberi hak didengar sebelum keputusan dibuat oleh Pengawal dan/atau Menteri.

Diputuskan (membenarkan rayuan tanpa perintah untuk kos)

C **Oleh Harmindar Singh Dhaliwal menyampaikan penghakiman mahkamah:**

(1) Peraturan 11(3) tidak *ultra vires* Akta kerana peruntukannya dibentuk untuk melaraskan dan mengawal terma-terma PJB seperti yang dibayangkan oleh s. 24(2)(e) Akta. Tiada merit dalam hujahan bahawa
D hanya Menteri yang berkuasa mengubah atau mengecualikan borang kontrak statutori kerana s. 4 Akta memperuntukkan bahawa Pengawal boleh melaksanakan apa-apa kuasa melalui atau bawah Akta ini. Berikutan itu, Pengawal mempunyai kuasa melaksanakan budi bicaranya seperti yang diperuntukkan bawah peraturan 11(3).

E

(2) Pengawal mempunyai kuasa luas bawah Akta. Oleh itu, tiada justifikasi bahawa kuasa mengubah atau mengecualikan kontrak mesti dilaksanakan hanya oleh Menteri dan tidak boleh ditugaskan kepada Pengawal. Juga penting bahawa PJB antara pemaju dan pembeli-pembeli dan terma-terma yang terkandung di dalamnya diambil daripada borang
F yang diperuntukkan dalam Jadual H yang didapati dalam Peraturan-Peraturan 1989 dan bukan dalam Akta. Oleh itu, adalah munasabah untuk menganggap kuasa yang diberi kepada Menteri adalah diniatkan untuk ditugaskan. Maka, hakim jelas terkhilaf apabila memutuskan bahawa peraturan 11(3) adalah *ultra vires* Akta.

G

(3) Surat bertarikh 17 November 2015 ditandatangani oleh seorang yang bernama Jayaseelan a/l K Navaratnam, bagi pihak Pengawal. Tiada indikasi dalam surat, secara zahirnya, bahawa keputusan tersebut disampaikan bagi pihak Menteri atau bahawa penandatangan surat tersebut bertindak atas kuasa Menteri. Sebenarnya, surat itu menyatakan
H bahawa 'Kementerian' yang mengambil keputusan itu, yang dinyatakan dibuat menurut peraturan 11 dan bukan peraturan 12. Oleh sebab Menteri tidak memfailkan apa-apa afidavit untuk memberi penjelasan, hujahan bahawa bukan Menteri yang membuat keputusan tersebut adalah bermerit dan tidak boleh ditolak begitu sahaja. Dengan itu,
I perintah yang terkandung dalam surat bertarikh 17 November 2015 dibuat tanpa bidang kuasa dan *ultra vires* Akta. Berikutan itu, perintah dalam surat tersebut terbatal dan tidak berkuat kuasa.

(4) Hak pembeli-pembeli menuntut ganti rugi jika berlaku kelewatan akan terjejas teruk atau mungkin lenyap. Oleh sebab pembeli-pembeli terdiri daripada satu kumpulan yang boleh dikenal pasti dengan mudah, mereka sewajarnya, sekurang-kurangnya, dimaklumkan mengenai permohonan pemaju untuk apa-apa lanjutan masa untuk menyiapkan projek dan diberi tempoh masa munasabah untuk menyatakan pendapat mereka sebelum keputusan tersebut dibuat. Oleh sebab hak didengar tidak diberi kepada pembeli-pembeli, keputusan yang dibuat, sama ada oleh Pengawal atau Menteri, adalah tidak batal dan tidak sah dan berkuat kuasa dan dengan itu, wajar diketepikan.

(5) Kerajaan atau pihak berkuasa awam tidak boleh mempunyai kuasa mutlak atau budi bicara tanpa batasan untuk menjalankan fungsinya. Oleh itu, mahkamah perlu mempunyai kuasa membatalkan keputusan pentadbiran yang tidak dibuat menurut undang-undang atau dibuat melampaui kuasa yang diperuntukkan undang-undang. Menteri, yang diamanahkan dengan kuasa budi bicara bawah Peraturan-Peraturan 1989, mesti bertindak adil. Tidak kira sama ada kuasa budi bicara yang perlu dilaksanakan bersifat perundangan, atau separa perundangan mahupun sesuatu yang bersifat pentadbiran semata-mata. Dalam kes ini, keputusan Menteri tidak boleh dikekalkan dan mesti diketepikan kerana pembeli-pembeli tidak diberi peluang didengar. Dalam keadaan itu, perintah, yang mengisytiharkan peraturan 11(3) *ultra vires* Akta, diketepikan dan perintah, bahawa keputusan dalam surat bertarikh 17 November 2015 adalah batal dan tidak sah, adalah disahkan.

Case(s) referred to:

Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2017] 4 CLJ 265 FC ***(refd)***

Ketua Pengarah Kastam v. Ho Kwan Seng [1975] 1 LNS 72 FC ***(refd)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

Legislation referred to:

Housing Development (Control and Licensing) Act 1966, ss. 4(1), (2), 24(2)(c), (e)

Housing Development (Control and Licensing) Regulations 1989, regs. 11(3), 12, Schedule H

(Civil Appeal No: W-01(A)-80-03-2017)
For the apellants - Khairul Nizam Mohd Kamal; SFC
For the respondents - KL Wong, Albert Soo, Viola De Cruz, Andrew Chan & Koh Kean Kang; M/s KL Wong

(Civil Appeal No: W-01(A)-81-03-2017)
For the apellants - Khairul Nizam Mohd Kamal; SFC
For the respondents - Audrey Lim; M/s Shui Tai

(Civil Appeal No: W-01(A)-86-03-2017
For the apellants - Khairul Nizam Mohd Kamal; SFC
For the respondents - KL Wong, Albert Soo, Viola De Cruz, Andrew Chan & Koh Kean Kang; M/s KL Wong

A *(Civil Appeal No: W-01(A)-400-03-2017)*
For the appellants - George Varughese, Johan Mohan Abdullah & Azhana Mohd Khairudin; M/s Johan Arafat Hamzah & Mona
For the respondents - KL Wong, Albert Soo, Viola De Cruz, Andrew Chan & Koh Kean Kang; M/s KL Wong

B *(Civil Appeal No:* W-01(A)-451-03-2017
For the appellants - George Varughese, Johan Mohan Abdullah & Azhana Mohd Khairudin; M/s Johan Arafat Hamzah & Mona
For the respondents - KL Wong, Albert Soo, Viola De Cruz, Andrew Chan & Koh Kean Kang; M/s KL Wong

C *Watching brief:*
For the Bar Council - Nicholas Chang & Elison Wong
For REHDA - Pretam Singh Darshan Singh & Amarpreet Kaur Randhawa

[Editor's note: For the High Court judgment, please see Ng Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors [2017] 1 LNS 1260 (overruled).]

D *Reported by S Barathi*

JUDGMENT

E **Harmindar Singh Dhaliwal JCA:**

[1] There are five appeals before us. They arise from a decision of the Kuala Lumpur High Court delivered on 27 February 2017. The High Court had allowed the applications for judicial review by three sets of applicants in three separate applications for judicial review which were heard together.

F **[2]** The applicants in each case were purchasers of apartment units in a project known as Sri Istana Condominium. They ("purchasers") brought judicial review applications against the Minister for Urban Wellbeing, Housing and Local Government ("the Minister"), the Controller of Housing of the same Ministry ("the Controller"), BHL Construction Sdn Bhd, the G developer, and in one application, the Ministry for Urban Wellbeing, Housing and Local Government.

[3] The applicants had sought an order to quash the decision of the Controller, which decision, by a letter dated 17 November 2015, amended the time period for delivery of vacant possession from 36 months to H 48 months in respect of the sale and purchase agreement entered into between the purchasers and the developer.

[4] Alternatively, they sought a declaration that the letter of 17 November 2015 was invalid as being beyond the jurisdiction stipulated in the Housing Development (Control and Licensing) Act 1966 ("the Act"). They also I sought a declaration that reg. 11(3) of the Housing Development (Control and Licensing) Regulations 1989 ("Regulations 1989") is *ultra vires* the Act.

[5] In essence, the High Court granted the judicial review application on the main basis that reg. 11(3) was *ultra vires* the Act and that the Controller of Housing had no power to waive or modify the contract of sale between the purchasers and the developer.

[6] Aggrieved with this decision, the respondents in the High Court have now appealed to this court. We heard arguments on 12 March 2018 and indicated that due to the urgency of the appeal, we would deliver a decision in two weeks. On 30 March 2018, we delivered our unanimous decision giving broad reasons as to how we had arrived at our conclusions. We indicated to the parties that a full written judgment will be prepared in due course. This is now the judgment of the court.

Background Facts

[7] BHL Construction Sdn Bhd, one of the appellants here ("the developer"), is the developer of a project to build a condominium known as the Palace Court @ Kuchai Lama ("Sri Istana Condo"). The respondents are purchasers of individual condominium units ("the units") in the said project. The sale and purchase agreement ("SPA") between the developer and the purchasers stipulate that the time period for delivery of vacant possession of the units shall be 36 months from the date of signing of the respectively SPAs.

[8] The developer had filed an application for an extension of time for delivery of vacant possession of the units to the Controller of Housing *vide* letter dated 20 October 2014 pursuant to reg. 11 of the Regulations 1989. The said application for extension of time was not approved by the Controller and the same was communicated to the developer *vide* letter dated 24 October 2014.

[9] Subsequently, exercising the right afforded under reg. 12 of Regulations 1989, the developer lodged an appeal to the Minister *vide* letter dated 28 October 2014, listing therein the reasons for the delay in completing the project within the stipulated period in the SPAs. The developer's said appeal for extension of time for the delivery of vacant possession for the said units was approved purportedly by the Minister *vide* letter dated 17 November 2015 granting an extension of 12 months. We say purportedly, and as we shall see, it was asserted that it was not the decision of the Minister.

[10] Now, there was no dispute that there was a delay in the completion of the project and that the developer became liable to pay damages to the purchasers. The decision by the Minister extinguished their right to claim damages. Aggrieved with this decision, the purchasers filed applications for judicial review at the Kuala Lumpur High Court. They were successful. The decision as stated in the impugned letter of 17 November 2015 was quashed as it was declared to be *ultra vires* the Act. Hence the appeals before us.

A **Issues before Us**

[11] Before us, the parties had raised several issues for our consideration and decision. The issues which we judged merited consideration were the following:

B (i) Whether reg. 11(3) of the Housing Development (Control and Licensing) Regulations 1989 ("the Regulations 1989") is *ultra vires* the Housing Development (Control and Licensing) Act 1966 ("the Act").

(ii) Whether the letter of 17 November 2015, in which an extension of 12 months was granted to complete the project, was made without C jurisdiction and is therefore invalid and of no effect.

(iii) Whether the purchasers ought to have been given a right of hearing prior to the decision made by the Controller and/or Minister granting the developer an extension of time to complete the project.

D *Whether Regulation 11(3) Is Ultra Vires The Act*

[12] The first issue is whether reg. 11(3) is *ultra vires* the Act. Regulation 11(3) states as follows:

> (3) Where the Controller is satisfied that owing to special circumstances or hardship or necessity compliance with any of the provisions in the E contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions:
>
> Provided that no such waiver or modification shall be approved if such application is made after the expiry of the time stipulated for the handing over of vacant possession under the contract of sale F or after the validity of any extension of time, if any, granted by the Controller.

[13] Now, under the Act itself, there are various provisions which set out the powers of the Minister and the appointment of the Controller of Housing. Section 4(1) of the Act provides that the Minister may appoint a Controller G of housing and any such number of Deputy Controllers, Inspectors of Housing and other officers and servants as the Minister may deem fit to appoint from amongst members of the public service. Section 4(2) of the Act provides that the Controller and the Deputy Controllers shall have and may exercise any of the powers on an inspector by or under this Act.

H **[14]** In order to achieve the aim of the Act, the Minister, by virtue of s. 24 of the Act, has the power to make regulations for the carrying into effect the provisions of the Act. In particular, the Minister has the power under s. 24(2)(c) to prescribe the form or forms of contracts which shall be used by a licensed housing developer, his agent, nominee or purchaser both as a I condition of the grant of licence under this Act or otherwise.

[15] Importantly, by virtue of s. 24(2)(e) of the Act, the Minister also has the power to make regulations to "regulate and prohibit the conditions and terms of any contract between a licensed housing developer, his agent or nominee and his purchaser". A

[16] Now, the learned judge took the view that s. 24 of the Act does not confer power on the Minister to make regulations to delegate it to the Controller with the power to waive or modify the prescribed statutory Form H. The learned judge then held that reg. 11(3) which purportedly gives power to the Controller is null and void and *ultra vires* the Act as it has gone past the limit prescribed under the Act. The learned judge also appeared to take the position that the powers under s. 24 of the Act must be exercised by the Minister alone as there was no provision in the Act which allowed the Minister to delegate such power to the Controller. B C

[17] In our assessment, reg. 11(3) is not *ultra vires* the Act as it was a provision designed to regulate and control the terms of the SPA as envisaged by s. 24(2)(e) of the Act. The argument that only the Minister has the power to modify or waive the statutory form contract is without merit as s. 4 of the Act provides that the Controller may exercise any of the powers by or under this Act. It must follow, in our view, that the Controller has the power to exercise his discretion as granted under reg. 11(3). D

[18] In this context, it is noteworthy that the Controller has wide powers under the Act. There is therefore no justification that the power to modify or waive the contract must be exercised only by the Minister and cannot be delegated to the Controller. It is also significant that the SPAs between the developer and the purchasers and the terms contained therein are derived from the form prescribed in Schedule H which is to be found in the Regulations 1989 and not in the Act. It can therefore be reasonably inferred that the power granted to the Minister was intended to be delegable. Having said that, we are constrained to note that it would have been desirable for such powers to be provided in the Act itself so as to better protect and preserve the interest of the purchasers. That, in the end, is a matter for Parliament to decide. E F G

[19] In the circumstances, we are unable to agree with the decision of the learned judge. We are, for the reasons given, constrained to hold that the learned judge was plainly wrong in holding that reg. 11(3) was *ultra vires* the Act. H

Whether The Letter Of 17 November 2015 Was Invalid And Of No Effect

[20] The next issue concerns the validity of the letter of 17 November 2015. In this respect, the developer had first applied to the Controller by letter dated 20 October 2014 for an extension of time to complete the project. This was rejected by the Controller. The developer then wrote to the I

Minister seeking for the same extension. This was followed by the impugned letter of 17 November 2015 in which an extension of 12 months was granted to complete the project.

[21] We note that this letter of 17 November 2015 was signed by one Jayaseelan a/l K Navaratnam on behalf of the Controller. There is no indication from the face of the letter that this decision was conveyed on behalf of the Minister or that the signatory of the letter was acting on the authority of the Minister. In fact, the letter stated that it was the "Kementerian" (Ministry) which had taken the decision. To muddy the waters further, the letter indicated that the decision was made pursuant to reg. 11 instead of reg. 12.

[22] The impression gained from considering the whole of the letter is that the appeal from the decision of the Controller was decided by the Controller himself which, to put it mildly, was wholly untenable. Under reg. 12, any person aggrieved with the decision of the Controller under reg. 11(3) can appeal to the Minister and the decision of the Minister is final and shall not be questioned in any court. Since the Minister did not file any affidavit to provide some clarity, the contention that the Minister was not the one who made the decision has merit and cannot be dismissed lightly.

[23] We are therefore of the view that the order as contained in the letter of 17 November 2015 was made without jurisdiction and *ultra vires* the Act. Accordingly, we hold that the order in the said letter is a nullity and of no effect.

Whether The Purchasers Were Entitled To A Right To Be Heard

[24] The final issue raised before us in arguments was whether the purchasers ought to have been given a right of hearing prior to the decision made by the Controller and/or Minister. In this respect, we note that the purpose of the Act was to protect the interest of the purchasers. As the rights of the purchasers to claim damages in the event of delay would be adversely affected or even extinguished, we agree that the purchasers must be given an opportunity to be heard prior to any decision made.

[25] As the purchasers comprise a group which can easily be ascertained, they should at least be notified of the developer's application for any extension of time to complete the project and be given a reasonable period of time to state their views before any such decision is taken. As no such right to be heard was afforded to the purchasers, it is our judgment that the decision made in this case, whether by the Controller or Minister, was null and void and of no effect and should accordingly be set aside.

[26] In this regard, the law reports are replete with cases on the law pertaining to the right to be heard where an individual is affected by an administrative decision. The jurisprudence in this context is well-settled. We

only need to refer to two cases. In the first case, *Ketua Pengarah Kastam v. Ho Kwan Seng* [1975] 1 LNS 72; [1977] 2 MLJ 152, the Federal Court held that the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is affected by an administrative action, no matter whether it is labelled "judicial", "*quasi*-judicial" or "administrative" or whether or not the enabling statute makes provision for a hearing. In speaking for the Federal Court, Raja Azlan Shah FJ (as His Royal Highness then was) observed at p. 154: "... In particular, the silence of the statute affords no argument for excluding the rule, for the justice of the common law will supply the omission of the Legislature ..."

[27] In the next case, *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2017] 4 CLJ 265, the Federal Court was confronted with the following question of law:

> In considering an application for registration of a trade union in respect of a particular establishment, is there a statutory requirement on the part of the Director-General under section 12 of the Trade Unions Act, 1959 to consult with any existing trade union representing workman in that establishment, trade, occupation or industry.

[28] In an instructive judgment, Balia Yusuf Wahi JCA (now FCJ) in speaking for the Federal Court observed as follows:

> [72] Lest we forget, natural justice is a universal concept and must be observed at all levels especially when an individual or a body having power to determine questions affecting the rights of other individuals. We say not only common sense dictates that the views of NUBE ought to be considered but it is also implied that the principles of natural justice (in this case the right to be consulted) must be observed. The position of the DG in this case may be likened to that of the Minister in *Attorney General v. Thomas D'arcy Ryan* [1980] AC 718 where the Privy Council observed:
>
> > ... the minister was a person having legal authority to determine a question affecting the rights of individuals. This being so, it is a **necessary implication** that he is required to observe the principles of natural justice when exercising that authority; and if he fails to do so, his purported decision is a nullity. (emphasis added)
>
> [73] Authorities are in abundance to support the view that the courts will imply into the statutory provision a rule that the principle of natural justice should be applied. Lord Guest in *Wiseman & Anor v. Borneman & Ors* [1971] AC 297 (House of Lords) had reiterated that "This implication will be made on the basis that Parliament is not to be presumed to take away parties' right without giving them an opportunity of being heard in their interest. In other words, Parliament is not presumed to act unfairly". In that case, the dictum of Byles J in *Cooper v. Wandsworth Board of Works* [1863] 14 CBNS 180 was quoted as a clear proposition to this effect and which has been followed in many subsequent cases in England.

[29] There also appeared to be some suggestion by the learned SFC that the Minister had an absolute or unfettered discretion in exercising his powers under the 1989 Regulations. This argument was no doubt inspired by reg. 12 of the 1989 Regulations which provided that the decision of the Minister shall be final and shall not be questioned in any court. With respect, we must at once observe that any such proposition is misconceived in law as it offends the fundamental principle that every legal power must have legal limits (see *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135). Implicit in this principle is that every administrative exercise of discretion must be made in accordance with law. If such exercise of discretion is not according to law, the courts have the jurisdiction and indeed the duty to set aside such decision.

[30] We should also reiterate lest it be misunderstood that no Government or public authority is above the law. Their powers are circumscribed by law. It must follow that no Government or public authority can have absolute or unfettered discretion in carrying out its functions. There is nothing novel about this proposition as it stems from principles consonant with a constitutional democracy and the rule of law. We might add that absolute or unfettered discretion can be likened to an unruly animal which, if unleashed from its cage, will be hard to control. For this reason, the courts must have the power to strike down administrative decisions which are not according to law or made in excess of the power provided by law.

[31] In the present context, we would accordingly surmise that the Minister, who was entrusted with the discretionary power under the 1989 Regulations, must act fairly. In our view, it does not matter whether the discretionary power to be exercised was judicial in nature, or *quasi*-judicial or even a purely administrative one. As the rights of the purchasers to claim damages in the event of delay would be adversely affected or even extinguished by the exercise of such discretionary power, it is our judgment that the purchasers must be given an opportunity to be heard prior to any decision made. Since no such right was afforded, the decision of the Minister cannot stand and must be set aside.

Conclusion

[32] In the result, we allow the appeal and set aside the order of the learned judge which declared that reg. 11(3) is *ultra vires* the Act. We however affirm the order of the learned judge that the decision stated in the letter of 17 November 2015 is null and void for the reasons we have provided which reasons are different from the ones given by the High Court. As agreed by the parties, there will be no order as to costs.